

COMMENT

THE 2004 EUROPEAN UNION MEMBERS AND THE VISA WAIVER PROGRAM: CONSIDERING FREE TRADE AND NATIONAL SECURITY

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In this world, shipmates, sin that pays its way can travel freely, and without passport; whereas Virtue, if a pauper, is stopped at all frontiers.
— Herman Melville†

1. INTRODUCTION

The United States economy demonstrates how large internal economies allowing free movement of people and capital can create greater wealth for all parties involved.¹ Diverse economic regions throughout the United States created a gross domestic prod-

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† HERMAN MELVILLE, *MOBY DICK OR THE WHALE* 62–63 (Random House 1930) (1851).

¹ The United States exceeded the GDP growth rate of large European nations, such as France, Germany, and the United Kingdom, for the period 1973–2001 with 2.94%, 2.20%, 1.75%, and 2.08% respectively. See ANGUS MADDISON, *THE WORLD ECONOMY: HISTORICAL STATISTICS* 260 tbl.8b (2003) (listing historical growth changes for national economies). The United States has grown at average annual growth rate of 3.5% for the period 1930–2006. See U.S. DEP'T OF COMMERCE, BUREAU OF ECON. ANALYSIS, *GROSS DOMESTIC PRODUCT PERCENT CHANGE FROM PRECEDING PERIOD* (Jan. 31, 2007), <http://www.bea.gov/national/xls/gdpchng.xls> (listing the year over year percent change in GDP in 2000 chained dollars).

uct (GDP) of \$12.455 trillion in 2005,² and imported \$1.671 trillion worth³ of products from around the world. Economists in Europe, understanding the benefits of trade and cooperation, embarked on a nascent step towards a European Union with the creation of the European Coal and Steel Community in 1951.⁴ After a slow, phased integration of economies, a single market was finally created with the signing of the Treaty of Maastricht in 1992.⁵ This fifteen member European group, later known as the European Union (EU), created a strong internal economy based on free trade, as well as an economic group that could engage in uniform trade with other countries, streamlining international trade policies.

The European Union grew substantially on May 1, 2004, when ten additional European nations were integrated. Economists and government officials studied the decision intensively and concluded that it would produce benefits for all twenty-five member countries involved.⁶ A study conducted by the Directorate General for Economic and Financial Affairs in 2001 said that acceding countries could expect to gain between 1.3 and 2.1% annually as a result of the enlarged union, while existing members could expect their economies to increase by 0.7% cumulatively.⁷ These percentage increases only represent the benefits produced by integrating economies and adopting uniform policies.

² News Release, U.S. Dep't of Comm., Bureau of Econ. Analysis, Gross Domestic Product: Third Quarter 2006 (Final) 8 tbl.3 (Dec. 21, 2006), available at <http://www.bea.gov/bea/newsrelarchive/2006/gdp306f.pdf>.

³ See U.S. Dep't of Comm., TradeStats Express - National Trade Data, <http://se.export.gov/> (last visited Feb. 23, 2007) (first select "National Trade Data," then "Global Patterns of U.S. Merchandise Trade," and then select "Imports" for the "flow" option).

⁴ See Europa, The History of the European Union, http://www.europa.eu.int/abc/history/index_en.htm (last visited Feb. 23, 2007) (explaining the various treaties that took place over the forty-one year history of European integration to a single market).

⁵ *Id.*

⁶ See European Commission, Enlargement: Basic Arguments, http://ec.europa.eu/enlargement/archives/press_corner/basic_arguments_en.htm (last visited Feb. 23, 2007) (explaining the arguments in favor of the 2004 EU enlargement).

⁷ *Id.*

The expansion plan certainly had its skeptics;⁸ the economic data failed to support these critics, however. The common countervailing argument was that free movement would create an unsustainable influx of Eastern Europeans into Western Europe. This was not supported by the European Commission study which said that even if there were absolutely free movement within the EU, only 335,000 citizens would move into Western Europe.⁹ Moreover, the expansion plan does not necessarily allow for completely free movement. Under the actual system, existing member nations can restrict the labor movement of transitional members for the first two years and then ease them over the next three years.¹⁰ New members take another leap towards unity when they become parties to the Schengen Agreement. Schengen Agreement members have access to an integrated border security database and create a singular border check for short-term business visitors and tourists, much like the border control in the United States.¹¹

The trade gains being realized by the European Union member states through free movement liberalization raise the question of how the United States can get the most economic benefit from what has become the world's largest economic engine.¹² One way to exploit the new growth within Europe is by incorporating the

⁸ See European Commission, *Eurobarometer Report Number 56: Public Opinion in the European Union* 71 (2002), available at http://ec.europa.eu/pulic_opinion/archives/eb/eb56/ec56_en.pdf (showing that 30% of EU citizens were against the 2004 enlargement).

⁹ HERBERT BRÜCKER ET AL., *THE IMPACT OF EASTERN ENLARGEMENT ON EMPLOYMENT AND LABOUR MARKETS IN THE EU MEMBER STATES* pt. A, at 92 (2000), available at http://ec.europa.eu/employment_social/employment_analysis/report/part_1.pdf.

¹⁰ In extenuating economic circumstances nations can apply to the Commission for an additional two years of national restrictions. See Directorate Gen. for Employment & Soc. Affairs, *Free Movement of Workers to and from the New Member States – How Will It Work in Practice?* 1 (2003), available at http://ec.europa.eu/employment_social/free_movement/docs/pr_en.pdf (answering questions about labor restrictions); SCADPlus: Freedom of Movement for Workers After Enlargement, <http://europa.eu/scadplus/leg/en/cha/c10524.htm> (last visited Feb. 23, 2007) (explaining the system of integrating free movement throughout the new EU members over time).

¹¹ See generally SCADPlus: The Schengen Acquis and its Integration into the Union, <http://europa.eu/scadplus/leg/en/lvb/l33020.htm> (last visited Feb. 23, 2007) (discussing the Schengen Agreement and how it fits into the EU and European border security).

¹² U.S. DEP'T OF STATE, BUREAU OF EUROPEAN & EURASIAN AFFAIRS, FACT SHEET: EUROPEAN UNION ECONOMIC OVERVIEW (2006), <http://www.state.gov/p/eur/rls/fs/58969.htm>.

new EU member states into the Visa Waiver Program (VWP). The VWP was created to promote trade by allowing citizens from friendly nations to travel to the United States without the burdensome task of obtaining a visa. The economic data show that the new 2004 enlargement members (EU-10) are providing growth percentages significantly greater than the old EU member states (EU-15);¹³ thus incorporating these countries into the VWP will allow the United States to obtain the maximum benefit from these rapidly expanding economies.

There are obviously many implications that can arise from opening up the U.S. economy and border to citizens of the EU-10 states through the VWP. This Article is broken into sections to explain the issues and why they are important. Section 2 discusses the background of the VWP and its legislative mechanisms. Section 3 elaborates on the economic and political benefits of granting EU-10 states VWP status. Section 4 examines this issue through the prism of national security and border control improvements that came about following the attacks of September 11. Taking these factors into account will help policymakers make a rational decision about what sort of legal framework should be constructed for nonimmigrant visa holders from the EU-10.

2. VISA WAIVER PROGRAM AND ITS PROCEDURES

2.1. *History of the Visa Waiver Program*

When Congress created the Visa Waiver Pilot Program ("VWPP") in 1986, it stated that the VWPP had a threefold purpose: (1) to improve the international relations of the United States; (2) to promote tourism to the United States; and (3) to reduce administrative burdens at United States consulates globally.¹⁴

¹³ The EU-15 had a GDP growth rate of 1.5% for 2005, while the EU-10 ranged from Malta's 2.2% to Estonia's 10.5% with an average of 5.82% and a median of 5.1% growth per country. See Eurostat, Real GDP Growth Rate, http://epp.eurostat.ec.eu.int/portal/page?_pageid=1996,39140985&_dad=portal&_schema=PORTAL&screen=detailref&language=en&product=SDI_MAIN&root=SDI_MAIN/sdi/sdi_ed/sdi_ed_inv/sdi_ed1110 (last visited Feb. 23, 2007) (providing data from which the EU-10 states' average and median growth rates can be calculated).

¹⁴ See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 217, 313, 100 Stat. 3359, 3435-39 (codified as amended in scattered sections of 8 U.S.C.) (explaining why having a liberalized travel system with allied nations is important to the United States).

The VWPP, which became effective in 1988,¹⁵ was an adjunct to the B Visitor category under the Immigration and Nationality Act ("INA"). This means that those covered by the VWPP are almost exclusively non-immigrants coming to the United States for either business (B-1) or short-term tourism (B-2).¹⁶ The VWPP created a system where citizens of politically friendly and economically strong nations would no longer have to go through the somewhat tedious process of submitting a visa application to their U.S. consulate or pay the fee associated with the application.¹⁷

H.R. 3767 made the VWPP, henceforth known as the "Visa Waiver Program" ("VWP"), permanent as of October 30, 2000, after passing without objection in both houses.¹⁸ In support of the VWP, Representatives on the floor of Congress remarked about the program's economic impact to many communities throughout the country and cited a desire to finally make those economic gains permanent after reauthorizing the pilot program six times.¹⁹ As of January 2007, twenty-seven nations qualify under the VWP.²⁰ This

¹⁵ See 22 C.F.R. § 41.2(l)(2) (2002) (showing the first countries to become eligible for the VWPP).

¹⁶ See A. James Vazquez-Azpiri & Daniel C. Horne, *The Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL'Y REV. 513, 532-33 (2005) (describing B-1 and B-2 type visas and how individuals admitted under these visas differ from individuals admitted under the VWP); see also 8 U.S.C. § 1101(a)(15)(B) (2000) (defining who is able to enter the United States under a type B visa).

¹⁷ The 2005 visa application fee is \$100. See Visitor Visas – Business and Pleasure, http://travel.state.gov/visa/temp/types/types_1262.html (last visited Feb. 23, 2005) (explaining requirements for aliens who want to visit the United States for short-term tourism and business); see also 22 C.F.R. § 41.107 (2005) (empowering the Secretary of State to prescribe the visa application fee).

¹⁸ 146 CONG. REC. S9657 (daily ed. Oct. 3, 2000); 146 CONG. REC. H9545 (daily ed. Oct. 10, 2000).

¹⁹ California Representative Sam Farr noted:

More than 46 million international visitors come to the United States each year, and the numbers keep on increasing. These tourists spend more than \$90 billion in the United States, supporting directly and indirectly 16.9 million American jobs, and creating a tourism trade surplus of \$14.2 billion. More than 94 percent of these jobs are created by small businesses located in communities in every corner of the United States. In fact, the travel industry provides jobs for more than 800,000 people in California and 20,000 in my district alone. As the second largest economic engine on the central coast, bringing in \$1.5 billion a year, tourism is absolutely integral to my district's economic success story.

146 CONG. REC. H9541-01 (daily ed. Oct. 10, 2000) (statement of Rep. Farr).

²⁰ Qualifying countries are: Andorra, Austria, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein,

number had been twenty-nine, but Argentina and Uruguay were revoked in February 2002 and April 2003 respectively, stemming from financial crises in those countries.²¹ Notably, Canada is absent from this list, because its citizens are subject to a more lenient standard, being able to enter with any government identification rather than a visa or passport.²² This is scheduled to change on January 23, 2007 when all passengers traveling by air between Canada and the United States will be required to bring a passport or passport-like Air NEXUS card.²³ Other neighboring nations, such as Mexico and Bermuda, have traditionally had travel document requirements that differ from most other countries in the

Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. Visa Waiver Program, Eligibility, 8 C.F.R. § 217.2 (2005); Overview of the Visa Waiver Program, U.S. Customs and Border Protection, http://www.cbp.gov/xp/cgov/travel/id_visa/visitors_us/vwp/vwp.xml (last visited Feb. 23, 2007) (listing countries that are part of the visa waiver program).

²¹ At the end of 2001, Argentina entered an economic crisis resulting in high unemployment and default on international loans. During the same period, Uruguay was experiencing a serious recession. As a result, citizens from these countries were violating the terms of VWP entry at a relatively high rate, and U.S. agencies recommended that Argentina and Uruguay should lose their VWP status. See ALISON SISKIN, CONG. RESEARCH SERV., VISA WAIVER PROGRAM 22 n.8-11 (updated Jan. 24, 2006), available at http://www.usembassy.at/en/download/pdf/visa_waiver.pdf (noting that Argentina and Uruguay are no longer members of the VWP).

²² See Information for Non-Americans, Consular Services at the U.S. Mission in Canada, <http://www.amcits.com/canada.asp> (last visited Feb. 23, 2007) (stating entry requirements to enter the United States from Canada); Who from Canada, Mexico and Bermuda, Needs a Nonimmigrant Visa to Enter the United States Temporarily?, Dep't of State, http://travel.state.gov/visa/temp/without/without_1260.html (last visited Feb. 23, 2007) [hereinafter Nonimmigrant Visa] (explaining that there is no visa requirement for Canadian citizens). See also U.S.A. Bound: Advice for Canadian Travelers, Canadian Consular Affairs, http://www.voyage.gc.ca/main/pubs/usa_bound-en.asp ("As of October 26, 2004, the U.S. Visa Waiver Program requires visitors from various countries to have machine-readable passports to enter the U.S. This requirement does not apply to Canadian citizens even if the passport is issued abroad.").

²³ See New Requirements for Travelers, Dep't of State, http://www.travel.state.gov/travel/cbpmc/cbpmc_2223.html (last visited Feb. 23, 2007) (elaborating on the new document requirements under the Western Hemisphere Travel Initiative for travel between the United States and its North American neighbors that previously were exempt from a passport requirement); New Entry Requirements to the United States, Canadian Consular Affairs (2006), http://www.voyage.gc.ca/main/sos/ci/cur-en.asp?txt_ID=852 ("Please note that Canadians are not required to have Machine Readable Passports to enter the United States, even if the passport was issued abroad. Canada is not a participant in the U.S. Visa Waiver Program.").

world.²⁴ These countries now will be subject to the Western Hemisphere Travel Initiative that requires passports or Air NEXUS cards beginning in January 2007 and may require passports for land and sea travel by January 1, 2008.²⁵

2.2. *Standard of Review for Countries Obtaining VWP Status*

Under the United States Code²⁶ and the amendments in the Code of Federal Regulations,²⁷ there are a number of qualifications that must be satisfied for a country to gain Visa Waiver Program status:

- (1) The country offers reciprocal travel privileges to United States citizens;²⁸
- (2) Nationals of the country have a low refusal rate of nonimmigrant visas (below 2.5 or 3 percent depending on the year and designation);²⁹
- (3) The country has certified that it has a machine-readable

²⁴ Nonimmigrant Visa, *supra* note 22 (explaining the rules for entering the United States by citizens of Mexico and Bermuda from their respective countries).

²⁵ The January 1, 2008 deadline may be amended depending on the ability of the Department of Homeland Security to carry out this mandate. Additionally, the creation of a credit card-sized PASS Card is being tested as a possible alternative for land and sea travel between the United States and Canada, Mexico, the Caribbean, and Bermuda. Documents You Will Need to Enter the United States, U.S. Customs and Border Protection, http://www.cbp.gov/xp/cgov/travel/alerts/whti/documents_needed.xml (last visited Feb. 23, 2007).

²⁶ See Visa Waiver Program for Certain Visitors, 8 U.S.C. § 1187 (2000) (describing the qualifications to gain Visa Waiver Program status).

²⁷ See Visa Waiver Program, Eligibility, *supra* note 20 (listing the eligibility requirements of the Visa Waiver Program).

²⁸ See Visa Waiver Program for Certain Visitors, *supra* note 26, § 1187(a)(2)(A)(2000) (defining when an alien is a national of program country).

²⁹ See *id.* § 1187(c)(2)(A):

(i) [T]he average number of refusals of nonimmigrant visitor visas for nationals of that country during—(I) the two previous full fiscal years was less than 2.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years; and (II) either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year; or (ii) such refusal rate for nationals of that country during the previous full fiscal year was less than 3.0 percent.).

See also Overview of the Visa Waiver Program, *supra* note 20 (summarizing the requirements for a country to be designated as part of the visa waiver program and the requirements on individuals entering the United States as part of that program).

passport program that will begin issuing machine-readable passports not later than October 26, 2004 (although the Secretary of State can extend this deadline to September 30, 2007 if the country in question is attempting to meet the requirements.)³⁰

(4) "The Attorney General, in consultation with the Secretary of State," prepares a report evaluating "the effect the country's designation would have on the [United States'] law enforcement and security interests";³¹ and

(5) "The Attorney General, in consultation with the Secretary of State," determines that the country's designation for the program would not compromise the law enforcement or national security interests of the United States, including interests in enforcing immigration laws.³²

(6) Fulfill other requirements including reporting problems with stolen passports on a timely basis, etc.³³

3. ECONOMIC AND POLITICAL BENEFITS OF INCLUDING NEW EU MEMBER STATES IN THE VWP

3.1. *Economic Benefits of Embracing Eastern Europe*

In 2004, Western Europe had over twenty-four times the number of visitors to the United States as Eastern Europe³⁴ despite the fact that the population of the EU-15 exceeded the new EU-10 by only a factor of six.³⁵ Some of the disparity may be due to the per

³⁰ See Visa Waiver Program for Certain Visitors, *supra* note 26, § 1187(a)(3)(A)–(B), (c)(B) (describing requirements for machine-readable passports and the Secretary of State's authority to extend the waiver period).

³¹ *Id.* § 1187(c)(2)(C)(i), *amended by* 8 C.F.R. § 217 (inserting the term "Department of Homeland Security," as applicable).

³² *Id.* § 1187(c)(2)(C)(i)–(ii), *amended by* 8 C.F.R. § 217 (inserting the term "Department of Homeland Security," as applicable).

³³ See generally Visa Waiver Program for Certain Visitors, *supra* note 26, § 1187(c) (detailing the requirements that a country must meet to be designated as a program country by the Attorney General and the Secretary State).

³⁴ There were 380,059 visitors from Eastern Europe and 9,305,859 from Western Europe. 2004 Profile of Overseas Travelers to the U.S., Dep't of Commerce, ITA, Office of Travel & Tourism Industries (May 2005), <http://tinet.ita.doc.gov/view/f-2004-07-001/index.html>.

³⁵ The EU-10 added 74 million people to bring the overall total to 455 million. See *Dazzling Entry for New EU Members*, BBC Online, May 1, 2004, <http://news.bbc.co.uk/1/hi/world/europe/3675241.stm> (describing the expansion of the EU).

capita gross domestic product (GDP) divide between some of the old EU-15 countries and the EU-10. However, the GDP gap is not absolute among all new EU member countries and that gap is closing quickly. For instance, the per capita GDP of Portugal, a current VWP country, is below that of Estonia, which is not part of the VWP program.³⁶ Despite the similarity of per capita GDP, there is a 22% greater frequency of travelers from Portugal than from Estonia when standardizing for differences in population.³⁷ This statistic with respect to the VWP may be correlative rather than causative, but going through the visa process, interview, and the \$100 application fee likely provides some disincentive to travelers.

In the first year that Argentina was admitted to the then VWPP, there was an 11.5% increase in tourism.³⁸ Ultimately, Argentina's status was revoked, but it was due to financial instability in that country, rather than a security concern. The only EU-10 country to ever be designated as a VWP country, Slovenia, issued 9883 visas in 1996, the year before joining the VWPP.³⁹ By 2000 the number of visitors had increased sixty-three percent to 16,119 while the State Department only had to issue 1212 visas.⁴⁰ If the other nine new members of the EU were to replicate the Slovenian experience, it would create over 100,000 new visitors while issuing 150,000 fewer visas.⁴¹

³⁶ Compare Background Note: Estonia, U.S. Dep't of State, <http://www.state.gov/r/pa/ei/bgn/5377.htm> (2007) [hereinafter Background Note: Estonia] (listing the per capita GDP for Estonia as \$14,500), with U.S. Dep't of State, Background Note: Portugal, <http://www.state.gov/r/pa/ei/bgn/3208.htm> (2007) [hereinafter Background Note: Portugal] (giving statistical data that the per capita GDP for Portugal was \$14,059, which is lower than that of Estonia).

³⁷ See Background Note: Estonia, *supra* note 36 (showing that Estonia has a population of 1.3 million and had 5,919 visitors to the U.S. in 2004); Background Note: Portugal, *supra* note 36 (noting that Portugal has a population of 10.4 million and had 60,930 visitors to the U.S. in 2004, which is a per capita difference of over 22% compared to Estonia).

³⁸ See SISKIN, *supra* note 21, at n.32 (discussing the increase in the number of visitors to the United States by joining the VWP).

³⁹ See Report, *An Evaluation of the Security Implications of the Visa Waiver Program*, Office of the Inspector Gen., Dep't of Homeland Sec., OIG-04-26, April 2004 at 34, available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_SecurityImpVisaWaiverProgEval_Apr04.pdf [hereinafter *Security Implications*] (discussing the number of visas issued and number of short-term visitors for each VWP-status nation).

⁴⁰ See *id.* at 32, 34 (comparing the number of visas issued in 1996 to the number issued in 2000 and the total number of visitors from Slovenia).

⁴¹ See Nonimmigrant Visa Issued, U.S. Dep't of State (2005), http://travel.state.gov/pdf/FY2005_NIV_Detail_Table.pdf (increasing the total number

The administrative burden of engaging in the visa process is rather large. A General Accounting Office (GAO) study from November 2002 looked into the cost of eliminating the VWP. Initial direct government costs to eliminate the VWP have an estimated range from \$739 million to \$1.281 billion and then \$522 million to \$810 million in each successive year depending on the percentage of visa candidates interviewed.⁴² The GAO believes that much of these direct costs could be recuperated through the \$100 application fee⁴³ for machine-readable visas depending on the number of visa applicants.⁴⁴

There is a continual struggle to keep the burden on administrators low so that they can focus on the most serious threats to the United States. In November 2005, the Federal Aviation Administration, in coordination with the Department of Homeland Security, began allowing certain sharp objects on planes again because focusing on these relatively innocuous items was diverting resources away from detecting more dangerous items.⁴⁵ Even if the State Department raises visa costs to cover administrative expenditures, the new costs only exacerbate the deterrent for foreigners to visit the United States. Any Economics 101 student can explain how new taxes create a deadweight loss,⁴⁶ and, in the instance of visa costs, the deadweight loss triangle being created with high application fees adversely affects U.S. businesses.

Real losses and gains are likely to be felt not by governmental institutions, but by communities that have significant exposure to

of B-1, B-2, or B-1/B-2 nonimmigrant visas from the Cyprus, Czech Republic Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia by 63% (from 164,163 to 267,585) and lowering the number of visas issued by 92.5% (from 164,163 to 12,312) to correlate with the results of the Slovenian experience).

⁴² U.S. GEN. ACCOUNTING OFFICE, BORDER SECURITY: IMPLICATIONS OF ELIMINATING THE VISA WAIVER PROGRAM, GAO 03-38, at 25-28 (2002), available at <http://www.gao.gov/new.items/d0338.pdf> (estimating the administrative costs to the United States government of eliminating the VWP).

⁴³ See *id.* at 28 (raising the cost of visa application from \$65 to \$100 per application).

⁴⁴ See *id.* at 28, n.37 (citing Federal Register, Vol. 67, No. 60, March 28, 2002, which states that costs associated with visa issuance are intended to be fully paid for by the visa application fee).

⁴⁵ See Permitted and Prohibited Items, Transp. Sec. Auth., U.S. Dep't of Homeland Sec., <http://www.tsa.gov/travelers/airtravel/prohibited/permitted-prohibited-items.shtml> (last visited Feb. 23, 2007) (supplying an updated list of prohibited items on airplanes).

⁴⁶ See generally JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 550-558 (2005) (describing how to calculate dead weight loss).

the tourism industry. Trade deficits for the United States have continued to grow on an annual basis. One area where the United States has a trade surplus is international tourism. A 2000 study by the Department of Commerce showed that the United States has a trade balance of \$14 billion dollars for international travel.⁴⁷ The expenditures by foreigners during 2004 represented more than \$90 billion dollars added to the U.S. economy.⁴⁸ Problems with visas are generally costly for American business, with one international trade group estimating the loss to U.S. exporters at \$30.7 billion for the period June 2002 to March 2004.⁴⁹

To encourage trade, officials from the EU have talked about an amendment to the current VWP that focuses on the business community rather than tourism at large. The *Financial Times* reported that, "Benita Ferrero-Waldner, EU commissioner responsible for external relations, said she could envisage the EU and the United States drawing up a list of companies whose transatlantic activities and movements had been rendered difficult by heightened security procedures following the terrorist attacks in the United States."⁵⁰ A compromise plan involving easing travel for executives has been suggested. Peter Mandelson, EU trade commissioner, said, "I am very sensitive to the perceived and real security needs of the US. On the other hand, we don't want economic traffic to be impeded by preventing the free movement of people beyond what is absolutely necessary."⁵¹

⁴⁷ See Office of Travel and Tourism Indus., 1999(pr) Trade Balance, Top Four Private Service Categories—1999pr, <http://tinet.ita.doc.gov/view/f-1999-561-001/index.html> (last visited Feb. 23, 2007) (showing the top four categories for trade surplus in the United States).

⁴⁸ See 146 CONG. REC. H9541-01, *supra* note 19 (summarizing various statistics related to the positive effect visitors have on the U.S. economy); WORLD TRAVEL & TOURISM COUNCIL, UNITED STATES TRAVEL & TOURISM—FORGING AHEAD 17 (2004), <http://www.tbr.org/about/pubs/us-0204.pdf> (discussing the value of travel to the U.S. economy and the future impact of travel and tourism globally).

⁴⁹ See THE SANTANGELO GROUP, DO VISA DELAYS HURT U.S. BUSINESS? 3 (2004), <http://www.nftc.org/default/visasurveyresults%20final.pdf> (analyzing the economic effect of foreign visas on American businesses); RUTH ELLEN WASEM, CONG. RESEARCH SERV., VISA ISSUANCES: POLICY, ISSUES, AND LEGISLATION 21 (2005) (reviewing the impact of recent visa legislation).

⁵⁰ See Raphael Minder, *Brussels Seeks Help on Transatlantic Security for 'Trusted' Companies*, FIN. TIMES, May 19, 2005, at 12.

⁵¹ *Id.*

3.2. Geopolitical Benefits

In addition to the economic benefits provided by giving VWP designation to countries, there are also political advantages. It appears that Eastern European governments have foreign policy positions more in line with the United States than some of their Western European counterparts. In recent years, Poland and Hungary have made some of the largest contributions of troops to the Coalition Forces in Iraq.⁵² In 2005, the Czech Republic was the lead country fighting to re-impose EU sanctions on Cuba for jailing seventy-five democratic activists, many of whom were associated with Oswaldo Paya's Varela Project.⁵³

Eastern Europe is more likely to have friendly interactions with the United States if we reciprocate the visa-free travel they allow U.S. citizens. Gaining VWP designation is not a small priority for emerging markets anxious to conduct business with U.S. corporations. The Czech Foreign Minister made sure to address this issue when meeting with Secretary Powell in 2004.⁵⁴ Czech officials have believed that they were on the cusp of being included in the VWP for ten years, even publicly reporting that they were accepted.⁵⁵ In 2005, the VWP was the first issue addressed by Secretary Rice during her statement before a meeting with Polish Foreign Minister Adam Rotfeld.⁵⁶ Continually disappointing the new members of

⁵² See Stephen J. Hedges, *Coalition Nations Look Ahead to Exit*, CHICAGO TRIBUNE, Feb. 1, 2005, at C1 (discussing the makeup of the coalition forces and how many countries are beginning to pull their troops out).

⁵³ Oswaldo Paya is a democratic activist in Havana, Cuba and the 2002 winner of the EU Sakharov Prize for Freedom of Thought. See Meghan Clyne, *Europeans Capitulate in Showdown on Cuba*, N.Y. SUN, June 14, 2005, at 1, available at <http://www.cubanet.org/CNews/y05/jun05/15e18.htm> (describing how the Czech Republic has taken the lead in advocating EU sanctions on Cuba for human rights violations).

⁵⁴ See Daily Press Briefing from Richard Boucher, Spokesman, U.S. State Dep't (July 13, 2004), available at <http://www.state.gov/r/pa/prs/dpb/2004/34359.htm> ("Visa policy was one of the issues that was discussed today in our meetings with the Czech interim Foreign Minister.")

⁵⁵ See *Visa Curb 'To Go'*, FIN. TIMES, July 17, 1995, at 12 ("The U.S. will scrap the entry visa requirement for Czech citizens next year [. . .] according to Michael Zantovsky, the Czech ambassador to Washington. The U.S. embassy said Washington was considering the Czech Republic for inclusion in its visa waiver programme.").

⁵⁶ Condoleezza Rice, U.S. Sec'y of State, Remarks before Meeting with Polish Foreign Minister Adam Rotfeld (May 31, 2005) available at <http://useu.usmission.gov/Article.asp?ID=99CE8507-E151-47D2-BD89-EB9D1E73BB28> (discussing the possibility of Poland gaining VWP status).

the EU who have adopted all the reforms to become Western style capitalist democracies may sour relations with those countries. While EU member nations continue to have international affairs differences, the Council of the European Union is the branch of the EU that is charged with stating their uniform foreign policy. Acting with a united foreign policy has occurred with respect to the Israeli-Palestinian conflict⁵⁷ and is likely to continue in the future. The Council of the European Union is made up of 321 seats, of which the EU-10 countries hold eighty-four.⁵⁸ This is a powerful bloc of votes and it is in the interest of United States to have the State Department work to keep a strong relationship with these countries to ensure that U.S.-EU-10 foreign policy interests are aligned.

3.3. Political Costs of Not Acting

Not allowing EU members to join the VWP, especially Greece who is already part of the Schengen agreement, could result in the EU placing visa requirements on U.S. citizens due to existing reciprocity provisions.⁵⁹ According to a U.S. government official, this enabling mechanism has not been engaged because Greece has not contested or notified the EU of the requirement.⁶⁰ Further prob-

⁵⁷ "European Union members provided about \$600 million in aid to the Palestinians last year. More than half came from the European Union's budget." Craig S. Smith, *Europeans Suggest Directing Aid to Abbas*, N.Y. TIMES, Feb. 24, 2006, at A9 (showing that the EU is acting with a unified foreign policy regarding Middle East peace and that a majority of the foreign aid is coming from a unified pool rather than from separate member nations).

⁵⁸ See Council of the European Union, The Council is the Main Decision-Making Body of the European Union, http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=242&lang=en&mode=g (last visited Feb. 23, 2007) (showing how votes are distributed in the Council of European Union by member nations).

⁵⁹ See Council Regulation 539/2001, para. 5, 2001 O.J. (L 81) 1 (EC) (providing for the creation of a mechanism whereby visa-exempt countries need not provide reciprocity to the nationals of one or more member state).

⁶⁰ See BORDER SECURITY: IMPLICATIONS OF ELIMINATING THE VISA WAIVER PROGRAM, *supra* note 42, at 20, n.25 (presenting the possibility that the United States could lose its visa-free status for travel to nations within the European Union if Greece were to complain about a lack of reciprocity). See also Press Release, European Commission, Report of the Commission to the Council on Visa Waiver Reciprocity with Certain Third Countries, Memo/06/11 (Jan. 13, 2006), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/06/11&format=HTML&aged=0&language=EN&guiLanguage=en#fn3> (describing the deadline for presenting the Commission with evidence that there was a lack of reciprocity between countries that are part of the Schengen Treaty and a third-

lems with reciprocity could transpire when the EU-10 members join the Schengen Agreement. Initially these members were expected to join the Schengen Agreement on October 2007 after fully adopting the new Schengen Information System (SIS II).⁶¹ SIS II is a comprehensive security network that creates a universal border control for the region.⁶² In September 2006, the European Commission stated that it would likely be more than eighteen months before the EU-10 nations would be able to become members of the Schengen Agreement.⁶³ Even the EU-10 golden child, Slovenia, which has already been accepted into the Euro monetary currency area due to its high per capita GPD, low unemployment, and economic stability, has still not been accepted into the Schengen Agreement.⁶⁴ The proposed delay may have been politically motivated, rather than having true merit, because Czech Interior Minister Ivan Langer gave his assurance that the Czech Republic is able to adopt the Schengen Information System (SIS II) and have it up and running by October 2007.⁶⁵ Following outcries from leaders such as Mr. Langer, in early December 2006 the Interior Ministers decided to tentatively approve the Schengen area enlargement to include nine of the new member states that joined the Union in 2004.⁶⁶ The compromise proposal submitted by Portugal has land

party country).

⁶¹ See Breffni O'Rourke, *New EU States to Join Schengen Open-Border Agreement in 2007*, RADIO FREE EUROPE—RADIO LIBERTY, Apr. 7, 2005, <http://www.rferl.org/featuresarticle/2005/04/f3403f9e-5bd7-4f74-8504-7395a7a10fe2.html> (discussing the integration of the EU-10 countries into free movement with the EU-15). See generally *The Schengen Acquis and its Integration into the Union*, *supra* note 11 (explaining how the Schengen Agreement fits into the overall European border security).

⁶² See SCADPlus: Schengen Information System II, <http://europa.eu/scadplus/leg/en/lvb/l33183.htm> (last visited Feb. 23, 2007) (giving a legislative summary of the requirements for the SIS systems).

⁶³ See Kristina Alda, *Country Shut Out of Border Treaty*, THE PRAGUE POST, Sept. 20, 2006, available at <http://www.praguepost.com/articles/2006/09/20/country-shut-out-of-border-treaty.php> (relaying the outcome of the recent European Commission meeting on the possible enlargement of the Schengen zone).

⁶⁴ See Carter Dougherty, *In Eastern Europe, a Switch to the Euro Comes Slowly*, N.Y. TIMES, Dec. 6, 2006, at C4 (detailing how only Slovenia has been able to achieve the economic growth and stability needed to adopt the Euro).

⁶⁵ See Alda, *supra* note 63 (quoting the Czech Interior Minister, who was upset with the decision of the European Council regarding entry into the Schengen Area).

⁶⁶ All EU-10 members except Cyprus will become full members of the Schengen Agreement. See Press Release, Justice and Home Affairs, Transport, Telecommunications and Energy Ministry, Internal Border Controls to be Lifted Between the New and Old Member States as of 31 December 2007 and 29 March

and sea borders being phased out on December 31, 2007, and airports by March 29, 2008 at the latest.⁶⁷ Any delays in the ability to adopt the SIS II security network will result in the use of the SISone4all system until SIS II implementation is complete.

Once these new nations join the Schengen Acquis and adopt a uniform visa policy, it will be tougher for the United States to continue its policy of treating EU nations individually. Since Poland and the Czech Republic have made VWP designation a priority,⁶⁸ they may use their joining the Schengen Treaty as leverage to gain an exception to the existing State Department's usual refusal rate regulations.⁶⁹

Members of both major American political parties have recognized the benefits of adding other countries to the VWP program. In the 109th session of Congress, Democrat Sheila Jackson-Lee introduced a bill to add Poland as a VWP designated country.⁷⁰ This legislation was not proposed with expected economic benefits blinding security efforts. Representative Jackson-Lee's legislation provides for suspension of Poland from the VWP if their overstay rate exceeds 3%.⁷¹ Republicans Nancy Johnson and Rick Santorum proposed similar legislation only days later.⁷² During the last session, legislation was also proposed to give South Korea VWP status.⁷³ Although the idea of increased trade with allies has bipartisan support, few members of Congress are willing to stand behind it.⁷⁴

2008 (Dec. 5, 2006), available at http://www.eu2006.fi/news_and_documents/press_releases/vko49/en_GB/177677/ (specifying the details of the internal border control regulations between new and old EU member states).

⁶⁷ *Id.*

⁶⁸ See *supra* notes 55–56.

⁶⁹ See discussion *supra* Section 2.2 explaining the VWP criteria. See also discussion *infra* Section 5 explaining the current VWP status of EU-10 countries.

⁷⁰ See 151 CONG. REC. H411 (daily ed. Feb. 8, 2005) (introducing H.R. 634).

⁷¹ See H.R. 634, 109th Cong. § 2(c) (1st Sess. 2005) (showing that VWP status requires continuous satisfaction of certain qualifications).

⁷² See 151 CONG. REC. S1260 (daily ed. Feb. 10, 2005) (proposing S. 348). See also 151 CONG. REC. H411 (daily ed. Feb. 8, 2005) (proposing H.R. 635).

⁷³ See H.R. 4304, 109th Cong. § 1 (1st Sess. 2005) (citing South Korea's ability to meet the biometric standards and the \$1 billion in revenue generated by South Korean tourists).

⁷⁴ Only eight Representatives are co-sponsors of H.R. 634 and only two Senators and seven Representatives are co-sponsors of S. 348/H.R. 635. See THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00634:@@P>, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00348:@@P>, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00635:@@P>.

4. NATIONAL SECURITY CONCERNS

One of the most obvious concerns with the VWP is that by decreasing the number of checks on people coming into the country, it is easier for people with deleterious motives to enter the United States. Although none of the terrorists aboard American Airline flights 11 and 77 or United Airline flights 93 and 175 entered the United States through the VWP exemption, others wishing to engage in terrorist activities have tried to exploit the more lenient VWP.⁷⁵

Richard Reid, traveling on a British passport, was detained by passengers and crew of Flight 63 while he tried to light explosives hidden within his shoes.⁷⁶ In February of 2001 Zacarius Moussaoui entered the United States from France under the VWP.⁷⁷ After overstaying the ninety-day period allowed under the VWP, Moussaoui enrolled in a flight school in Minnesota before being arrested by FBI agents. He was recently put on trial for his involvement with September 11th.⁷⁸

There was a worry about the 2003 decision to extend the deadline on machine-readable passports for twenty-six of the twenty-seven VWP countries because "[i]n some Western European countries, including France and Spain, more than a third of all passports in circulation do not have so-called machine-readable features. The majority of passports from Switzerland are not machine-

⁷⁵ See David Firestone & Dana Canedy, *The Suspects: F.B.I. Documents Detail the Movements of 19 Men Believed to Be Hijackers*, N.Y. TIMES, Sept. 15, 2001, at A3 (describing the backgrounds of the terrorists who hijacked the flights on September 11th). None of the terrorists aboard the flights on September 11th were from countries that have ever been part of the VWP or VWPP. It seems unlikely that a country like Saudi Arabia, although it is an ally and trading partner of the United States, would become part of the VWP because a large segment of the population holds anti-American sentiments.

⁷⁶ See Jon Henley, *War in Afghanistan: "Shoe Bomber" Email*, THE GUARDIAN, Jan. 19, 2002, at 4, available at http://www.guardian.co.uk/uk_news/story/0,636057,00.html (describing an email revealing Reid's intent to blow up the plane). See also A. James Vazquez-Azpíri & Daniel C. Horne, *The Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL'Y REV. 513, 521 (2005) (highlighting that Richard Reid's bombing attempt was only foiled thanks to help from passengers and crew).

⁷⁷ See Vazquez-Azpíri & Horne, *supra* note 76, at 521.

⁷⁸ See Seymour M. Hersh, *The Twentieth Man: Has the Justice Department Mishandled the Case Against Zacarias Moussaoui*, THE NEW YORKER, Sept. 30, 2002, at 56, available at http://www.newyorker.com/fact/content/?020930fa_fact (showing that Moussaoui used the VWP exemption to enter the United States, and that violation of nonimmigrant status contributed to his arrest).

readable.”⁷⁹ Fortunately, machine-readable passports with biometric information have since been implemented, allowing automated systems to track those who come into the country.⁸⁰

Having machine-readable passports is particularly valuable because it provides defense against the misuse of lost and stolen passports. The Office of the Inspector General at the Department of Homeland Security cited that, “Every time a new country entered the VWP, its passports became targets for counterfeiters, petty crooks who attempt photo substitutions, and organized criminals who steal blank passports”⁸¹ Machine-readable passports that are checked against a lookout system allow border security officials to examine if the particular passport number has been reported lost or stolen. Also, digitized photographs are more difficult to forge than laminated pictures.⁸²

4.1. Border Control Technology Changes After September 11, 2001

Following the events of September 11th, the President, Congress, and Federal Agencies embarked on a major restructuring of the national intelligence agencies. These changes in administrative responsibilities within the federal government resulted in the creation of the Department of Homeland Security (DHS).⁸³ The establishment of the DHS created a single agency to house the responsi-

⁷⁹ Philip Shenon, *New Passport Rules to Fight Terrorism Are Put Off for a Year*, N.Y. TIMES, Sept. 9, 2003, at A20 (citing the debate between the Departments of State and Homeland Security over whether to extend the waiver for a number of VWP designated countries). See also U.S. Department of State, Bureau of Consular Affairs, MRP Required for All VWP Travelers October 1, 2003, http://travel.state.gov/visa/laws/telegrams/telegrams_1428.html (last visited Feb. 23, 2007) [hereinafter MRP Required for All VWP Travelers] (stating that Belgium was required to adhere to machine-readable passport requirements since May 15, 2003).

⁸⁰ See Department of Homeland Security, Visa Waiver Program: Passport Requirements Timeline, http://www.dhs.gov/xtrvlsec/programs/content_multi_image_0021.shtm (last visited Feb. 23, 2007) [hereinafter Passport Requirements Timeline] (describing implementation of new passport requirements).

⁸¹ See *Security Implications*, *supra* note 39, at 19 (discussing the opinion of a Homeland Security official with regard to lost and stolen passports).

⁸² See *id.* at 24 (recommending the use of lookout systems using the passport number and ICN number to help identify when stolen VWP passports are used after being forged).

⁸³ See generally Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2003) (establishing the new federal agency that encompasses a variety of intelligence and emergency organizations).

bilities previously divided among many agencies, and the Immigration and Naturalization Service was abolished as a result.⁸⁴

At the same time, Congress—with the help of the Department of State and the agencies that would become part of the DHS—created legislation to increase the information available on nonimmigrants entering the United States through the “Chimera system.”⁸⁵ Two other significant changes were stricter background checks on foreign students studying in the United States⁸⁶ and the increase of technology on the passports of citizens from foreign countries wishing to remain part of the VWP.⁸⁷

Specific technological increases on passport security have been passed as new technology has been created and allies of the United States have agreed to coordinate on these matters. The USA Patriot Act of 2001 advanced the date for machine-readable passports from October 2004 to October 2003, but still allowed the Secretary of State to extend the deadline to September 2007 on a case-by-case basis.⁸⁸ This allows the State Department to examine each participating country and put pressure to increase security where questionable practices exist.⁸⁹ Secretary Powell extended the deadline for twenty-one countries until October 2004, which allowed all VWP countries to continue with the program.⁹⁰

A 2002 bill created a rule that passports issued by VWP coun-

⁸⁴ See *id.* (abolishing the INS).

⁸⁵ See 8 U.S.C. § 1711(a) (2000) (describing intelligence data system that should be available to law enforcement agencies and will help determine who should not be issued a visa and who should be deported).

⁸⁶ See *id.* §§ 1372, 1761 (codifying Enhanced Border Security and Visa Entry Reform Act of 2002 Pub. L. No. 107-173 § 501 (2002) and USA Patriot Act Pub. L. No. 107-56 § 416 (2001) which had the purpose of improving the foreign student monitoring program). See generally 8 U.S.C. § 1761 (explaining requirements for foreign students who wish to study in U.S. academic institutions).

⁸⁷ See Passport Requirements Timeline, *supra* note 80 (describing technology required to remain under visa waiver program).

⁸⁸ 8 U.S.C. § 1187(a)(3).

⁸⁹ Belgium had their date moved up to May 15, 2003, see MRP Required for All VWP Travelers, *supra* note 79 (discussing new requirements for machine-readable passports).

⁹⁰ See Press Release, U.S. Dep't of State (May 13, 2004), available at <http://www.state.gov/r/pa/prs/dpb/2004/32455.htm> (answering questions about whether Belgium would be dropped from the VWP after being on “double secret probation”); see also Press Release, U.S. Dep't of State, Machine-Readable Passport Requirements To Take Effect at U.S. Borders on June 26, 2005 (May 12, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/46138.htm> (“Belgian nationals traveling under the auspices of the Visa Waiver Program have been required to present a machine-readable passport since May 15, 2003.”).

tries after October 27, 2004 must also have a biometric identifier in addition to the machine-readable tamper resistant requirements.⁹¹ The biometric standard is regulated by the "International Civil Aviation Organisation (ICAO), which calls for biometric information to be contained in a "smart" chip on the passport."⁹² This deadline was extended to October 26th, 2005⁹³ because "ICAO's decision to make facial recognition technology the standard passport biometric was not made until May, 2003, leaving countries only 17 months to bring a biometric passport that meets that standard from design to production, a process that normally takes years."⁹⁴ Assistant Secretary Harty noted that if the deadline had not been expanded it would have created an incredible backlog in the visa system for a country like Japan, which would be expected to increase visa issuances from 111,000 to 1.5 million.⁹⁵

In addition to increasing the security of passports against tampering, checks at border entry points have been improved as well. The United States Visitor and Immigrant Status Indicator Technology system (US-VISIT) was designed to increase security by providing border inspectors with better screening capabilities of individuals once they are at the border.⁹⁶ This check is especially important for passengers entering under the VWP because these entrants do not go through a background check and interview process as they would with a visa application. Recognizing that those who seek to harm Americans often enter legally and then violate their travel restrictions, Congress appropriated "such sums as may

⁹¹ See Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173 (2002) (codified as amended at 8 U.S.C. § 1732(b)) (setting a deadline to have a biometric identifier on VWP country passports).

⁹² See Edward Alden & Sarah Laitner, *US Set to Give Way on Biometric Passports*, FIN. TIMES, June 9, 2005 at 1 (showing that the United States would interpret the statute as requiring a digital photograph rather than a "smart chip," which is not likely to arrive until 2006).

⁹³ Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 108-299, § 1732(b), 118 Stat. 1100 (2004) (amending the 2002 act by replacing "2004" with "2005" in three relevant subsections).

⁹⁴ *Enhanced Border Security and Visa Reform Act: Hearings Before the House Select Comm. on Homeland Security*, 108th Cong. 2d Sess. (2004), (Statement of Maura Harty, Assistant Sec'y of State for Consular Affairs), [hereinafter Testimony of Maura Harty] available at <http://www.state.gov/r/pa/ei/otherststmy/32986.htm>.

⁹⁵ *Id.*

⁹⁶ See Press Release, Dep't. of Homeland Security, US-VISIT Fact Sheet (updated June 5, 2006), available at http://www.dhs.gov/xnews/releases/pr_1160495895724.shtm (laying out goals and procedures for the US-VISIT program).

be necessary to fully implement the system.”⁹⁷ Inspectors at the border also use name, date of birth, nationality, gender, passport number, country of issuance, a digital photograph, and prints for both index finders, and run them against government databases for possible red flags.⁹⁸ As of 2006, entry procedures were implemented at entry gates for 116 airports and fifteen seaports, and exit procedures were implemented at twelve airports and two seaports.⁹⁹ These entry procedures include completion of an I-94 form and finger scans of all incoming passengers.¹⁰⁰ Scanning the fingerprint of the person arriving at the border control gate against the fingerprint encoded on the passport will ensure that the individual who is listed on the passport or visa is the same individual who enters the United States.¹⁰¹ An evaluation of the system by the DHS pointed out, “Since January 2004, there have been dozens of examples of persons claiming to be ‘John Smiths’ but after the fingerprint checks are run, they turn out to be wanted felons or suspected terrorists known by another name.”¹⁰² Also, when fully implemented, the automated entry-exit program will allow DHS officers to easily identify any visitors who have overstayed the ninety-day period allowed under the VWP.¹⁰³

⁹⁷ See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)* of 2001, Pub. L. No. 107-56 § 414(a)(2), 115 Stat. 271, 353 (2001) (emphasizing the importance of completing § 110 of the *Illegal Immigration Reform and Immigrant Responsibility Act* of 1996); see also 8 U.S.C. § 1365(a) (2000) (providing authority for the funding of the automated entry and exit data system).

⁹⁸ See SISKIN, *supra* note 21, at 4 (allowing border control officials to use the entering foreigners background information to determine if they are a national security risk).

⁹⁹ See Dep’t of Homeland Security, *US-VISIT: Current Ports of Entry*, http://www.dhs.gov/xtrvlsec/programs/editorial_0685.shtm (explaining the progress towards having a fully automated entry/exit database for overseas travel).

¹⁰⁰ US-VISIT Fact sheet, *supra* note 96 (listing the documents and entry procedures for overseas entry into the U.S.).

¹⁰¹ This will help insure that stolen passports are less likely to be used by terrorists to enter the country without alerting the border security. See Maura Harty Testimony, *supra* note 94 (explaining how biometric data will improve border security).

¹⁰² See *An Evaluation of the Security Implications of the Visa Waiver Program*, *supra* note 39 (discussing why it is important that VWP passport holders are subject to US-VISIT requirements).

¹⁰³ See SISKIN, *supra* note 21, at 4-5 (discussing the border inspection system for overseas visitors).

Border checks take less than a minute to complete because “[s]ince October 1, 2002, passenger arrival and departure information on individuals entering and leaving the United States under the VWP has been electronically collected from airlines and cruise lines, through DHS’s Bureau of Customs and Border Protection’s (CBP) Advanced Passenger Information System (APIS).”¹⁰⁴

Once the information is obtained, APIS sends the data to the DHS’s Arrival and Departure Information System (ADIS) to match it against names that are red flagged by DHS.¹⁰⁵ This passenger check has been viewed as flawed by some because names are often common or misleading. In a Committee hearing, Senator Edward Kennedy revealed that he had been stopped at a ticket counter in Washington D.C. because his name was flagged as having been on the “no-fly” terrorist list.¹⁰⁶ Although tracking names alone will inevitably lead to false positives, when combined with fingerprinting and passports with biometric identifiers the DHS has a powerful group of tools. These tools significantly decrease the need to perform background checks prior to reaching the airport, which is one of the main purposes of the visa process.

4.2. Economic Concerns: Overstays

Homeland Security has become the main objective of these increased border control programs. However, terrorist activity and the events of September 11th were not the primary factors in revoking the visa-waiver status of Argentina and Uruguay. In December 2001, Argentina experienced an economic collapse, resulting in many Argentine citizens attempting to come to the United States and overstay their ninety-day period of admission or to seek asylum in Canada.¹⁰⁷ The economic collapse was covered as an emergency allowing termination under the legislation creating the VWP.¹⁰⁸ The same is true of Uruguay, which experienced signifi-

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *Id.*

¹⁰⁶ See Charlie Savage, *No-Fly List Almost Grounded Kennedy, He Tells Hearing*, BOSTON GLOBE, Aug. 20, 2004, at A2 (questioning the value of the “no-fly” list if Senators are being flagged).

¹⁰⁷ See Termination of the Designation of Argentina as a Participant Under the Visa Waiver Program, 67 Fed. Reg. 7943-45 (Feb. 21, 2002) (to be codified at 8 C.F.R. pt. 217) (explaining rationale for revoking Argentina’s VWP status). See also SISKIN, *supra* note 21, at 3 nn.8-10 (stating that Argentina lost its VWP status due to economic instability).

¹⁰⁸ See 8 U.S.C. § 1187(c)(5)(B) (2000):

cant inflation between 2000 and 2003 and an overstay rate greater than twice the average for nonimmigrant visa holders.¹⁰⁹

When fully operational, the automated US-VISIT system could both detect overstays faster and provide accurate data.¹¹⁰ Having precise overstay data creates a justification for the United States removing a nation's VWP status. Unfortunately the expansion of the US-VISIT system to cover an individual's exit is being delayed due to financial and technological issues. The portion of the system that monitors entry that has already been implemented is, however, having a significant effect. Since its inception in January 2004, "[m]ore than 1,350 individuals with immigration violations or criminal records have been stopped from coming into the country"¹¹¹ Although legislation mandates that the exit portion of US-VISIT be operational at fifty major land crossings by the end of 2007, a GAO report says that such a system would cost \$3 billion and take five to ten years to complete.¹¹² This is a nontrivial setback on border security; however, it is unlikely to have a major affect on the EU-10 visitors who cross the border almost exclusively by air.

"[E]mergency" means: (I) the overthrow of a democratically elected government; (II) war (including undeclared war, civil war, or other military activity) on the territory of the program country; (III) a severe breakdown in law and order . . . [in] the country's territory; (IV) a severe economic collapse . . . ; or (V) any other extraordinary event in the program country . . . where the country's participation in the program could contribute to that threat.

¹⁰⁹ See Attorney General's Evaluations of the Designations of Belgium, Italy, Portugal, and Uruguay as Participants Under the Visa Waiver Program, 68 Fed. Reg. 10,954-57 (Mar. 7, 2003) (to be codified at 8 C.F.R. pt. 217) (explaining that Uruguay will be terminated from the participation in the VWP because of high intercept and overstay rates). See also SISKIN, *supra* note 21, at 1 n.3, 3 n.11 (explaining that economic factors rather than prevention of terrorism were the reasons for eliminating Uruguay from the VWP).

¹¹⁰ See SISKIN, *supra* note 21, at 3 nn.12-13 (explaining how a fully automated entry/exit system would enable Homeland Security officials to have accurate overstay information).

¹¹¹ Julia Malone, *A Security Progress Report Card*, ATLANTA JOURNAL-CONSTITUTION, Sept. 8, 2006, at 4A (evaluating border security measures that have been implemented since September 11, 2001).

¹¹² See Spencer S. Hsu, *U.S. Preparing to Drop Tracking of Foreigners' Departures by Land*, WASHINGTON POST, Dec. 15, 2006, at A5 (showing that the US-VISIT deadline will not be met). See generally, Border Security: US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry, GAO-07-248 (Dec. 2006), available at <http://www.gao.gov/new.items/d07248.pdf> (detailing the merits and shortcomings of the US-VISIT system as it is currently employed).

Fear of overstays might be a reason why the State Department and DHS would want or wants to keep some nonimmigrant visa applicants from coming to the United States. The high standard of living and dynamic economy of the United States allows for people from less wealthy nations to work illegally and provide for their families in other countries with sizable remittances. Eastern Europeans, for instance, had a high frequency of overstays on their non-immigrant visas immediately after the fall of the Soviet Union.¹¹³ While no overstay data for 2004–2005 is publicly available for the EU-10 nations, it seems counterintuitive that EU citizens (who are free to work in English speaking countries in the EU without having to risk spending time in a detention center or prison) would continue to illegally immigrate to the United States for economic reasons.¹¹⁴ Since the EU-10 nations have completely free access to “wealthy” economies like Sweden, Ireland and the United Kingdom,¹¹⁵ this creates a useful distinction as to why it is reasonable to have EU members gain VWP status and not nations with similar per capita GDP, like South Korea. Additionally, the security measures being created with the US-VISIT entry/exit program provide a much faster way of identifying any individuals who overstay their VWP status.¹¹⁶

¹¹³ See Ashley Dunn, *Greeted at Nation's Front Door, Many Visitors Stay On Illegally*, N.Y. TIMES, Jan. 3, 1995, at A1 (pointing to the large Polish illegal immigrant populations in New York and New Jersey).

¹¹⁴ *Freedom of Movement for Workers After Enlargement*, *supra* note 10 (stating that by 2007 when the EU-10 members join the Schengen Agreement, EU-15 members will have to show serious injury will result by allowing open borders in order to continue working limitations).

¹¹⁵ The right of residence for more than six months remains subject to certain conditions. Applicants must: (1) either be engaged in economic activity (on an employed or self-employed basis); (2) have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay (the Member States may not specify a minimum amount which they deem sufficient, but they must take account of personal circumstances); (3) be following vocational training as a student; or (4) be a family member of a Union citizen who falls into one of the above categories. See *Right of Union Citizens and Their Family Members to Move and Reside Freely within the Territory of the Member States*, Europa, <http://europa.eu.int/scadplus/leg/en/lvb/l33152.htm> (last visited Feb. 23, 2007).

¹¹⁶ See Dep't of Homeland Security, US-VISIT pamphlet, available at http://www.dhs.gov/xlibrary/assets/usvisit/US-VISIT_English_Web_Pamph-let.pdf (explaining that the US-VISIT program will allow officials to determine the status of aliens in the United States at any given time).

5. CURRENT STATUS

5.1. *Where Non-VWP Designated European Union Members Stand (Excluding 2007 Members Bulgaria and Romania)*

In order to gain the VWP designation, nations must meet a mathematical formula based on refusal rates for nonimmigrant visas before the Secretary of Homeland Security and the Secretary of State can approve a new country.¹¹⁷ Meeting the refusal rate is not the lone criterion for being accepted to the VWP, but a precursor to serious consideration.¹¹⁸ Secretary of State Condoleezza Rice has commented that she is working on a roadmap with Poland to help them achieve VWP status.¹¹⁹ In the years 2002-2004 Poland had refusal rates of 36%, 35%, and 26%, respectively.¹²⁰ While 26% in 2004 represents a significant one-year decline, it is obvious that Poland is a long way from meeting the necessary numerical threshold of 3%.¹²¹ Since full reports are only provided to relevant Congressional Committees or internally to State Department officials, it is difficult to have a fuller sense of why individuals are refused visas.¹²²

Greece and Cyprus have lowered their refusal rates to 3% for 2004,¹²³ but there has been no indication from the State Department or DHS that these countries are close to being accepted into most favored nation status for short-term travel. Even more curious is that Malta had 1% refusal rates for 2002-2004,¹²⁴ but there was no available information regarding Maltese consideration or talks

¹¹⁷ See 8 U.S.C. § 1187(c) (2000); 8 C.F.R. § 217.2 (2005). However, Congress is free to write in an exception to this for any country they see fit by amending the statute. Senator Santorum and Congresswomen Johnson and Jackson-Lee have introduced bills in the 109th session to do exactly this, see *supra* notes 100-01.

¹¹⁸ 8 U.S.C. § 1187(c); see also Daily Press Briefing, Statement of Richard Boucher, *supra* note 54 (stating that qualifying for the VWP is very formulaic).

¹¹⁹ Remarks of Condoleezza Rice, *supra* note 56 (discussing the possibility of Poland becoming a VWP status nation).

¹²⁰ See Congressional E-mail to Aaron Miller (Jan. 4, 2006, 14:23:32 EST) (on file with author) (providing State Department data on nonimmigrant visa refusal rates).

¹²¹ See *supra* text accompanying notes 25-30.

¹²² Interview with Charles Oppenheim, Chief, Immigrant Visa Control and Reporting Division, U.S. Dep't of State Visa Office (Jan. 18, 2006) (stating that reports are not released publicly and are only provided to Congressional Committees involved).

¹²³ Congressional E-mail to Aaron Miller, *supra* note 120.

¹²⁴ *Id.*

with the Maltese government about meeting biometric passport requirements. The only other EU-10 nation to fulfill the required refusal rate, Slovenia, had 1% percent refusal rates for 2002-2004 and is a VWP designated nation.¹²⁵ The EU-10 plus Greece have had a wide range of refusal rates from 2002-2004.¹²⁶

TABLE 1

	2002	2003	2004
Cyprus	16%	12%	3%
Czech Republic	18%	11%	9%
Estonia	30%	24%	14%
Greece	5%	4%	3%
Hungary	31%	21%	22%
Latvia	24%	20%	16%
Lithuania	39%	31%	26%
Malta	1%	1%	1%
Poland	37%	36%	26%
Slovakia	24%	26%	16%
Slovenia	1%	1%	1%

These refusal rates do not independently provide a completely accurate assessment of how far the EU-10 countries are from being designated as part of the VWP. According to data from the Bureau of Consular Affairs for fiscal year 2005, 4,277 visas were refused globally due to "Crimes Involving Moral Turpitude," 1,341 for a "Public Charge," and 102 for "Terrorist Activities."¹²⁷ However, the number of visas refused because of "Failure to Establish Entitlement to Nonimmigrant Status" accounted for 1,484,342 refusals the same year.¹²⁸ The second largest category of refusal was, "Applications Do Not Comply With the Provisions of the Immigration and Nationality Act or Regulations Issued Pursuant Thereto" accounting for 456,732 refusals. These two nebulous categories made

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ DEPT OF STATE, REPORT OF THE VISA OFFICE 2005, at tbl. XX, available at <http://travel.state.gov/pdf/FY05tableXX.pdf> (last visited Feb. 23, 2007); see also WASEM, *supra* note 49, at 11 (compiling a variety of statistical categories from the Report of the Visa Office for years 2000 and 2002).

¹²⁸ REPORT OF THE VISA OFFICE 2005, *supra* note 127 (listing categorical reasons why immigrant and nonimmigrant visa requests were refused for 2005).

up over 98% of all visa refusals for 2005.¹²⁹ Requests to gain a more accurate breakdown of this data are not met,¹³⁰ so it is difficult to determine why applicants from the new EU-10 are refused and the likelihood that these numbers will decrease over the next few years. It appears, however, that refusal rates will decrease because that is the current trend and both State Department officials and members of Congress appear to be willing to work with these countries to improve their refusal rates.¹³¹

The creation of loosely termed categories appears to place a great deal of authority with consulates and the visa-granting officials. All individuals wishing to enter the United States under a nonimmigrant visa have to overcome the presumption that they are attempting to enter the United States under immigrant visa status.¹³² This burden can be overcome by showing that the applicant has strong ties to their home country due to family, job, a house or a bank account.¹³³ The State Department information

¹²⁹ *Id.* (dividing the number of nonimmigrant visas refused under "Failure to Establish Entitlement to Nonimmigrant Status" and "Applications Do Not Comply With the Provisions of the Immigration and Nationality Act or Regulations Issued Pursuant Thereto" by the total number of refusals globally).

¹³⁰ It is standard that the State Department does not issue exact refusal rates except when requested by the Congressional Immigration Subcommittee.

We generally do not release exact refusal rates. Should host governments approach posts with a request to provide the "VWP refusal rate," we recommend against providing the exact rate. Instead, posts should respond that refusal rates are maintained for internal Department use only, and that the Department will advise the host country (via post) when the refusal rate and other initial criteria have been met for nomination purposes.

Passage of VWP Legislation: Where Do We Go From Here? Cable from Dep't of State, REF: STATE 210639, at ¶ 11 (Dec. 1, 2000), available at <http://www.immigrationlinks.com/news/news648.htm>.

¹³¹ See Press Release, Statement of Richard Boucher, *supra* note 54 (explaining how the U.S. worked with the Czech Republic to speed up the inclusion of the Czech Republic in VWP status); see also H.R. 634, 109th Cong. (2005); H.R. 635, 109th Cong. (2005); and S. 348, 109th Cong. (2005) (granting Poland VWP status under § 219 of the Immigration and Nationality Act).

¹³² See U.S. Dep't of State, Bureau of Consular Affairs, *Visa Denials* (May 2006), http://travel.state.gov/visa/frvi/denials/denials_1361.html (last visited Feb. 8, 2007) (explaining that § 214(b) of the Immigration and Nationality Act states, "[e]very alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for admission, that he is entitled to a nonimmigrant status.").

¹³³ *Id.* (showing how an applicant can overcome the presumption against their nonimmigrant status); see also Dep't of State, INA 214(B) Basis of Refusal Not Equivalent to Inadmissibility (12/04), <http://travel.state.gov/visa/laws/>

shows that economic rather than security considerations are the primary concern. A former consulate official speculates that, “[i]f you’re a drug smuggler from Sweden, your chances of getting in are almost 100 percent. If you’re a perfectly responsible, G-d-fearing person from Guatemala, your chances of getting in are maybe 10 percent.”¹³⁴ Evidence of this theory can be found in Saudi Arabia, where three months before the attacks on September 11, a program called “Visa Express” was instituted. The Saudi Consulate’s consular affairs department had a written policy, “[i]f the travel agency is reasonably satisfied that the traveler has the means to buy a ‘tour package,’ there will be little further evaluation of the applicant’s qualifications.”¹³⁵ Without the State Department reviews it is difficult to show how individual consulates adjudicate the defined standard of review, but these quotes about the Saudi process and the current rejection rate in countries like Poland and Hungary raise serious questions about uniformity. Perhaps establishing more specific categories for visa refusal¹³⁶ would create more transparency and show countries what needs to be done to gain VWP status.

5.2. Bulgaria, Romania, and Further EU Enlargement

Romania and Bulgaria joining the EU on January 1, 2007, creates a new group of countries that will need to deal with the prospect of labor restrictions, border control, and visa issues. Much of the ability to speed through the process of becoming an equal, borderless member of the EU that the United States would want to add to the VWP is dependent on economic prosperity and stability. The economic data for Bulgaria and Romania is well below the average for the EU-25. The two new EU members earn 32.9% and 34.1% of the EU-25 average, respectively,¹³⁷ based on a Purchasing

telegrams/telegrams_2173.html (last visited Feb. 23, 2007) (interpreting the language of § 214(b)).

¹³⁴ Joel Mowbray, *Catching the Visa Express: The Awful Program that Allows Saudis to Skip into the U.S.*, NAT’L REV., Jul. 1, 2002, at 31 (quoting Wayne Merry, former consular officer).

¹³⁵ See *id.* (describing that, because travelers with money have an easier time entering the United States, so do terrorists with money).

¹³⁶ See sources cited *supra* notes 117–19 (showing that categories most commonly used for refusing a nonimmigrant visa are vague).

¹³⁷ See Eurostat, GDP per capita in Purchasing Power Standards (“PPS”), http://epp.eurostat.ec.europa.eu/pls/portal/url/page/PGP_QUEEN/PGE_QUEEN_DETAIL?screen=detailref&language=en&product=STRIND_ECOBAC&root=STRIND_ECOBAC/ecobac/eb011 (last visited Feb. 23, 2007) (listing EU GDP

Price Standard ("PPS").¹³⁸ Latvia currently has the lowest spending power of any EU-25 nation at 48% of the average, which is significantly above Bulgaria and Romania.¹³⁹

Additionally, growth rates of 4.1% for Romania and 5.5% for Bulgaria are below the EU-10 per country average of 5.82%.¹⁴⁰ However, the two new members have growth well beyond the EU-15's 1.5% rate.¹⁴¹

The combination of relatively average economic data and low wages in Bulgaria and Romania is helping to saturate the European desire for enlargement. The reticence towards expansion can be seen in the labor restrictions placed on Bulgarian and Romanian workers by a vast majority of the EU-25. Currently the EU-10 countries are allowed to work without restrictions in the United Kingdom, Ireland, and Sweden, and have slightly limited access to other nations. Labor restrictions for the EU-10 are being phased out of some other countries and must be non-existent for the EU-25 by 2009.¹⁴² Among EU-15 nations, only Sweden is not keeping restrictions for a longer period of time against Romanian and Bulgar-

data); Bulgaria Economic Profile, http://ec.europa.eu/enlargement/archives/bulgaria/economic_profile_en.htm (last visited Feb. 23, 2007).

¹³⁸ As noted in the PPS:

The volume index of GDP per capita in Purchasing Power Standards (PPS) is expressed in relation to the European Union (EU-25) average set to equal 100. If the index of a country is higher than 100, this country's level of GDP per head is higher than the EU average and vice versa. Basic figures are expressed in PPS, i.e. [sic] a common currency that eliminates the differences in price levels between countries allowing meaningful volume comparisons of GDP between countries. Please note that the index, calculated from PPS figures and expressed with respect to EU25 = 100, is intended for cross-country comparisons rather than for temporal comparisons.

See GDP per capita in PPS, *supra* note 137.

¹³⁹ *Id.*

¹⁴⁰ See Real GDP Growth Rates, Eurostat, http://epp.eurostat.cec.eu.int/portal/page?_pageid=1996,39140985&_dad=portal&_schema=PORTAL&screen=detailref&language=en&product=SDI_MAIN&root=SDI_MAIN/sdi/sdi_ed/sdi_ed_inv/sdi_ed1110 (examining the charts in the finance section of the Eurostat website to find the real GDP data for Europe from 1996-2005 and projections for 2005-2006) (last visited Feb. 23, 2007).

¹⁴¹ *Id.*

¹⁴² In certain extreme circumstances, the EU may grant an additional two years of national labor policies. See Freedom of Movement for Workers After Enlargement, *supra* note 10 (explaining the timeline for removing labor restrictions).

ian workers.¹⁴³ Previously free markets like the United Kingdom and Ireland that allowed for thousands of laborers from the EU-10 to obtain jobs without restrictive permits will adopt “a system of limited work permits, quotas and green cards . . . [for] Romanian and Bulgarian workers.”¹⁴⁴ These tougher labor restrictions by the EU-15 demonstrate that individuals from Bulgaria and Romania would still have large economic incentives to overstay visas in the United States, which is one reason they are not ready for VWP status. Still, the United States should work with the EU and their new members to increase border security and economic stability so that Bulgaria and Romania can move towards VWP membership.

6. SUGGESTED STANDARD

The number of foreigners crossing the border creates a rational desire in Americans to have a system that can easily and accurately identify who has entered the country.¹⁴⁵ Still, policy makers must be aware that emerging economies like those in Central and Eastern Europe are incredibly important to economic growth.¹⁴⁶ Even from a historical perspective, emerging-market-led global growth is impressive. Since 2000, the world has experienced a 3.2% growth rate due in large part to emerging economies.¹⁴⁷ This pace outstrips both the industrial revolution, which created 1.3% global growth, and the rebuilding of Europe and Japan following World War II, which saw global growth average 2.9%.¹⁴⁸ With so much new business taking place, the United States would be foolish to ignore the growth provided by emerging markets.

¹⁴³ See Cristina Muntean, *Open doors, but who will knock?*, CZECH BUS. WEEKLY, Dec. 11, 2006 (stating that only eight countries will have open labor borders for Bulgarian and Romanian workers).

¹⁴⁴ See *Migrant access*, IRISH TIMES, Oct. 19, 2006, at 17 (discussing the strict labor policy towards Bulgarian and Romanian workers, which can remain in place for seven years).

¹⁴⁵ In 2002, 24,344,216 people visited the United States for short-term tourism or business. U.S. DEPT. OF HOMELAND SECURITY, FISCAL YEAR 2002 YEARBOOK OF IMMIGRATION STATISTICS 37 (2002), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2002/Temp2002.pdf>.

¹⁴⁶ Measured in terms of Power Price Parity (“PPP”). See *The New Titans*, THE ECONOMIST, Sep. 16, 2006, available at http://www.uni-graz.at/vwlwww/lehre/lv-steiner/WORLD%20ECONOMY_SEP06.PDF (discussing emerging market economies and their increasing share of global GDP and trade).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Secretary of Homeland Security Michael Chertoff has noted that "[w]e do not want a regime in which we are so focused on risk to the exclusion of all else that we lock everything down and we destroy our country."¹⁴⁹ Secretary Chertoff understands that devoting governmental resources exclusively to national security is a mistake. Instead, the government can use technology created through the open process of trade to improve border safety.

The OECD has written a report about the current account balance for the United States, which raised concern for global economic well being were there to be a shock to the U.S. economy or strength of the dollar.¹⁵⁰ This is an opinion shared by Former Federal Reserve Chairman Alan Greenspan.¹⁵¹ When investors put less money into U.S. securities, the economy will recover quickly if "workers can move freely between jobs, and . . . [if] government does not interfere in the economy any more than necessary."¹⁵² If the U.S. government liberalized trade and tourism (especially as the dollar depreciates against other currencies), it would likely help lessen the effects of any recession caused by a weakened dollar. In order to keep its strong economy, the United States needs to exploit areas where it has a comparative advantage. American cities, national parks, and museums are a tremendous draw for the global community because they are something that cannot be outsourced away like a textile job. In addition, the entrepreneurial spirit in the United States creates a continued incentive for people to do business there. It would be unfortunate to limit that spirit with regulation if legitimate security concerns can be solved with new technology.

The EU has realized that free trade is not anathema to national security concerns. That is why they have created an integrated border security database. Because border security is such a con-

¹⁴⁹ Demetri Sevastopulo, *Port Deal Reaction is Threat to Economy, Warns Chertoff*, FIN. TIMES (London), Mar. 13, 2006, at A1.

¹⁵⁰ See generally, Peter Jarrett, *Coping with the Inevitable Adjustment in the U.S. Current Account*, (Organization for Economic Co-operation and Development Econ. Dep't Working Paper No. 467, 2005), available at [http://www.oalis.oecd.org/olis/2005doc.nsf/linkto/ECO-WKP\(2005\)54](http://www.oalis.oecd.org/olis/2005doc.nsf/linkto/ECO-WKP(2005)54) (discussing policies that will help the shift in the account balance in the United States).

¹⁵¹ See, e.g., Nell Henderson, *Greenspan Says Policy Has Little Effect on Trade Gap*, WASH. POST, Nov. 15, 2005, at D6 ("Rising U.S. trade deficits 'cannot persist indefinitely,' Greenspan said to a conference marking the 80th anniversary of the Banco de Mexico. 'At some point investors will balk' at accumulating ever more U.S. stocks, bonds and other assets, he said.").

¹⁵² *Id.*

cern for EU-15 nations, the Schengen Agreement requires each EU-10 country to have its own technology database before joining. The United States should follow this example. Rather than the current U.S. regime, which uses a visa rejection rate mechanism, the standard should be based on border security and overstay rates.

6.1. Border Security

Having an automated entry system and tamper-resistant biometric passports are essential. The U.S. Department of Homeland Security has already implemented the automated US-VISIT entry program in 116 airports, 15 seaports, and 154 land ports of entry which can keep an automated record of every foreigner who enters the border.¹⁵³ Additionally, this system compares the entrant's fingerprint to the fingerprint on the passport, ensuring that the individual is not using someone else's passport. By making the inclusion of any EU-10 nations in the VWP contingent on those nations' putting into place automated entry systems and issuing tamper-resistant biometric passports, we deflate the need for background checks prior to reaching the border. Moreover, foreign ministers from the EU-10 have indicated a willingness to implement tamper-proof passports with biometric data.¹⁵⁴

6.2. Low Fear of Overstays

EU-10 citizens have the benefit of being able to work throughout the EU and have completely free labor access to English-speaking nations such as the United Kingdom and Ireland. This diminishes the fear that EU-10 citizens would use the VWP to attempt to work in the United States illegally. For these reasons, the United States should drop the refusal rate requirements for EU members. It should instead use the two-pronged standard of Schengen accession and US-VISIT compatible biometric passports as the mechanism that allows the State Department and DHS to add them to the VWP. This will strengthen the partnership between the United States and the EU and prevent the United States from losing its own visa-free status with the EU.¹⁵⁵ It is important that Congress preempt any action from EU nations demanding re-

¹⁵³ See US-VISIT: Current Ports of Entry, Dep't of Homeland Security, *supra* note 99 (listing the ports of entry that are fully compliant with US-VISIT entry procedures for foreigners).

¹⁵⁴ See Daily Press Briefing from Richard Boucher, *supra* note 54.

¹⁵⁵ See Council Regulation 539/2001, para. 5, 2001 O.J. (L 81) 1 (EC).

ciprocity with their own legislation because Congress is sometimes slow at enacting legislation which winds up having serious costs to the American taxpayer.¹⁵⁶ Working toward VWP membership for the EU states that are joining the Schengen Area will yield positive effects in trade, growth, and coordinated security.

¹⁵⁶ In 2002 a WTO panel agreed that the United States should be charged with anti-dumping penalties plus a government handout to foreign competitors. This resulted in \$114 million in tariffs before the Senate passed a bill to revoke this amendment. See Paul Blustein, *Senators Vote to Kill Trade Law; Byrd Amendment Illegal, WTO Says*, WASH. POST, Dec. 22, 2005, at D1 (discussing the repeal of a five-year-old amendment that has paid U.S. businesses \$1.25 billion to counteract dumping by foreign nations).